Date: April 27, 1995

Case No. 93-RIS-55

In the Matter of:

UNITED STATES DEPARTMENT OF LABOR,
PENSION AND WELFARE BENEFITS ADMINISTRATION,

Complainant,

v.

MERSKIN & MERSKIN, P.C.,

Respondent.

Wayne R. Berry, Esq.
For the Complainant

David L. Hatch, pro se
For the Respondent

BEFORE: DANIEL J. ROKETENETZ
Administrative Law Judge

DECISION AND ORDER

This proceeding arises under Section 502(c)(2) of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1132(c)(2), [hereinafter referred to as "ERISA"], and the implementing regulations at 29 C.F.R. §§ 1001, et seq. ERISA attempts to protect the integrity of employee benefit plans maintained by employers. 29 U.S.C. § 1002. By means of Section 502(c)(2) of ERISA, the Complainant, United States Department of Labor, Pension and Welfare Benefits Administration [hereinafter referred to as "the Complainant"], seeks to assess a civil penalty on the employee benefit plan, Merskin & Merskin P.C. Cash or Deferred Profit Sharing Plan [hereinafter referred to as "the Plan"], administered by the Respondent, Merskin & Merskin, P.C. [hereinafter referred to as "the Respondent"] for the late filing of annual reports for fiscal years 1988, 1989, 1990 and 1991.

Under Section 104(a)(1)(A) of ERISA, the administrator of an employee benefit plan is required to file an annual report within 210 days of the close of the plan year. The annual report appears as a completed Form 5500 "Annual Return/Report of Employee Benefit Plan [hereinafter referred to as "Form 5500"]. 29 C.F.R.

§ 2520.103-1(b)(1). The matter presently before me is the propriety of the civil money penalty assessed against the Respondent as a result of its late filing of the Plan's annual reports for fiscal years 1988 through 1991.

Issue Presented

Whether the penalties assessed by the Complainant against the Respondent, as Plan Administrator, in total amount of four thousand dollars ($4,000), for its failure to timely file the Plan's annual reports for the fiscal years 1988 through 1991 are justified.

Procedural History

On June 24, 1993, the Complainant, acting through its Division of Reporting Compliance and its Office of Chief Accountant, issued a Notice of Intent to Assess a Penalty in the amount of ten thousand dollars ($10,000) for reporting deficiencies against the Respondent, in it capacity of Plan administrator, for its employee benefit plan. (JX 3a - 3d)[1] Such deficiencies consisted of the Respondent's failure to file the Plan's annual reports required by ERISA for fiscal years 1988, 1989, 1990, and 1991. The Respondent responded to the Complainant's notices of intent to assess a penalty by four identical undated letters requesting that Complainant waive all penalties concerning Respondent's late filing of the Plan's Forms 5500 for fiscal years 1988 through 1991. (JX 4a - 4d) Respondent described several reasons, including the unexpected death of its managing partner, as explanation for why such reports were not timely filed. By letters of August 17, 1993, Complainant issued its Notice of Determination on Statement of Reasonable Cause that abated the penalty assessment of each Form 5500 late filing penalty by sixty percent, or fifteen hundred dollars ($1,500). (JX 5a - 5d) Thus, the August 17, 1993 notices of determination assessed a one thousand dollar ($1,000) penalty for each late filing, or four thousand dollars ($4,000) in total penalties. On September 17, 1993, Respondent filed an answer contesting the August 17, 1993 notices of determination issued by the Complainant in which the above-mentioned fines were assessed.

By joint motion dated December 6, 1993, the parties stipulated to a decision on the stipulated record. Therefore, pursuant to the April 11, 1994 Order, the hearing in this matter was cancelled and the parties were directed to file briefs on or before May 5, 1994.[2]

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[1] In this Decision and Order, "JX" refers to the Joint Exhibits of the parties.

[2] In accordance with the timetable set for filing briefs, the Complainant, on May 5, 1993, filed an extensive brief of law and fact regarding this matter. Conversely, the Respondent chose to simply submit a letter stating, in pertinent part, that

Joint Stipulations

In lieu of a formal hearing, the parties entered the following stipulations for the record which are accepted:

1. Respondent was the Plan sponsor and Plan administrator from at least April 30, 1988 until December 31, 1991.

2. By letter dated September 30, 1992, Respondent filed the annual (Form 5500) reports for the following fiscal years: 1988, 1989, 1990 and 1991.

3. Each of the Forms 5500 accompanying Respondent's September 30, 1992 letter was submitted for filing with the Department of Labor more than 210 days after the close of their respective Plan years.

4. Joint exhibit 1 is a true and correct copy of the September 30, 1992 letter.

5. Respondent filed the overdue Forms 5500 pursuant to the Department of Labor's grace period program announced in press release USDL 92-158.

6. Joint exhibit 2 is a true and correct copy of USDL 92-158.

7. The Department of Labor's grace period program required the Respondent to include a $1,000 penalty payment with each of the Forms 5500 submitted to the Department of Labor.

8. Respondent did not include the required $1,000 penalty payment with each of the Forms 5500 submitted to the Department of Labor.

9. By letters dated June 24, 1993, the Complainant issued its Notice of Intent to Assess a Penalty of $2,500 per overdue annual report regarding the Respondent's filing of the Plan's Forms 5500 covering the Plan years ending April 30, 1989, December 31, 1989, December 31, 1990, and December 31, 1991.

> We have established "reasonable cause" for our failure to file in a timely manner. Therefore, we request that the penalties be waived entirely as intended under this provision (29 CFR section 2560.502 c-2(2)).

Attached to the letter submitted was a copy of the undated letter sent to the Department of Labor, Pension and Welfare Benefits Administration, in regard to the June 24, 1993 notices of intent to assess a penalty on the Respondent wherein the Respondent describes the problems it suffered in the 1980's. (See JX 4a - 4d)

10. Joint exhibits 3a through 3d are true and correct copies of the Complainant's June 24, 1993 Notice of Intent to Assess a Penalty.

11. Respondent responded to the Complainant's June 24, 1993 notices by four identical undated letters requesting that the Complainant waive all penalties concerning its late filing of the Plan's Forms 5500.

12. Exhibits 4a through 4d are true and correct copies of the Respondent's undated letters requesting that the Complainant waive all penalties.

13. By letters dated August 17, 1993, the Complainant issued its Notice of Determination on Statement of Reasonable Cause that abated the penalty assessment of each of the Forms 5500 by $1,500 or sixty percent of the $2,500 that Complainant had proposed to assess in its June 24, 2993 letters.

14. Joint exhibits 5a through 5d are true and correct copies of the Complainant's August 17, 1993 notices.

15. Complainant's August 17, 1993 notices of determination on statements of reasonable cause assessed a penalty of $1,000 for each of the Forms 5500, resulting in a total penalty assessment of $4,000.

Based upon a thorough analysis of the entire record in this case, with due consideration accorded to the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following:

FINDINGS OF FACT

As indicated by the parties' stipulations and waiver of the formal hearing, the facts in this case are not in dispute. The Respondent is a firm of certified public accountants which serves as the Plan sponsor and Plan administrator for its own profit sharing plan. The Respondent failed to submit the Plan's annual reports, as required by ERISA, for the fiscal years 1988, 1989, 1990, and 1991. On September 30, 1992, the Respondent submitted annual Form 5500 reports pursuant to the Department of Labor's grace period announced in USDL 92-158. However, the Respondent did not include the required one thousand dollar ($1,000) penalty with each Form 5500. Subsequently, on June 24, 1993, the Complainant issued its Notice of Intent to Assess a Penalty of twenty-five hundred dollars ($2,500) per overdue annual report, or a total penalty of ten thousand dollars ($10,000).

The Respondent responded to the Complainant's notices of intent to assess a penalty by four identical letters in which the Respondent described the reasons behind the late filing of the

annual reports. The Respondent presented a series of problems which in sum accounted for its late filing of the Form 5500 reports. Such problems included:

- From 1980-86, the Respondent was under an extreme amount of financial pressure as a result of the aggressive expansion path undertaken by the firm as well as the buyout of the founding partners.

- On June 1, 1986, the Respondent's managing partner died suddenly in an automobile accident. The managing partner was an essential part of the firm's administration and thus, he was unable to be replaced.

- David Hatch, Plan administrator for the Respondent, assumed the duties of the managing partner as well as his prior duties.

- Reaching a settlement with the managing partner's estate and spouse consumed over three years.

- The firm and each of the partners were involved in an Internal Revenue Service tax audit which required over one year to resolve.

- As a result of the death of his friend and partner, as well as the other aforementioned occurrences, Hatch suffered from emotional problems which affected his ability to function.

- Finally, in preparing the Form 5500 reports, Hatch discovered that the trustee had allocated the Master account incorrectly and therefore, he was forced to allocate the amounts by hand.

Thereafter, the Complainant reduced the penalties against the Respondent and assessed a one thousand dollar ($1,000) penalty for each late filing. Thus, the total penalty assessed on the Respondent totaled four thousand dollars ($4,000).

CONCLUSIONS OF LAW

ERISA is a comprehensive statute which is remedial in nature and designed to protect employee benefit plans. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 510 (1989); Brink v. DaLesio, 667 F.2d 420, 427 (4th Cir. 1981). To accomplish its stated purpose, ERISA includes extensive reporting and disclosure provisions. The duty of completing and filing the annual report is that of the designated plan administrator. 29 U.S.C. §§ 1021 and 1024. Annual reports must be filed with the Department of Labor within 210 days after the close of the plan year. 29 U.S.C. § 1023. Amendments to ERISA empowered the Secretary of Labor to "prescribe such regulations as he finds necessary or appropriate to carry out" the provisions of ERISA. 29 U.S.C § 1135.

Pursuant to this authority, the Secretary promulgated the regulation at 29 C.F.R. § 2560.502c-2, which sets forth the administration and procedures governing the assessment of civil penalties under section 502(c)(2) of ERISA. Section 2560.502c-2 espouses that if no satisfactory filing is received within the prescribed period, a Notice of Intent to Assess a Penalty shall be issued. Such notice shall describe the deficiencies in the filing and the intended penalty.

In 1992, the Respondent submitted the appropriate Form 5500 reports for the previously unfiled annual reports under the procedure set forth by the Department of Labor in USDL 92-158.[3] USDL 92-158 provides, in part, that a one-time opportunity to file overdue annual reports without incurring the full penalty was created. Such overdue reports were required to be filed between March 23, 1992 and September 30, 1992. A one thousand dollar ($1,000) late fee was to be included with each overdue report filed under this procedure.

In accordance with the USDL 92-158 procedure, the Respondent filed its Forms 5500 for the fiscal years 1988 through 1991 on September 30, 1992. However, the Respondent did not include the required one thousand dollar ($1,000) late fee; rather, the Respondent submitted a letter pleading to the Complainant to waive all penalties for late filing in light of the fact that the late filings were the result of the unexpected death of the Respondent's managing partner. (JX 1) Because the Form 5500 reports submitted on September 30, 1992 did not include the one thousand dollar ($1,000) late fee, the Complainant rejected the Respondent's filings pursuant to USDL 92-158. Consequently, on June 24, 1993, the Complainant issued a Notice of Intent to Assess a Penalty totalling ten thousand dollars ($10,000), or twenty-five hundred ($2,500) per late report on the Respondent. (JX 3a - 3d)

The Respondent did not contest the fact that it failed to submit timely annual reports as required by ERISA. Rather, the Respondent filed a timely statement of reasonable cause, under penalty of perjury, as provided under 29 C.F.R. § 2560.502c-2(d), in response to Complainant's notices. Thereafter, the Complainant reduced the penalty assessment to four thousand dollars ($4,000) in total, or one thousand dollars ($1,000) per late report. (JX 5a - 5d)

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[3] The Office of Information for the Department of Labor issued USDL 92-158 which was entitled "Labor Department to Assess Civil Penalties for Failure to File Timely Form 5500 Reports." The procedure set forth in USDL 92-158 is published at 57 Fed. Reg. 14,436 (1992).

Reasonable Cause

The regulations under ERISA provide that the Department may waive all or part of the penalty to be assessed upon a showing by the administrator that some reasonable cause existed for the failure to file a proper annual report. 29 C.F.R. § 2560.502c-2(d). Such showing of reasonable cause must be filed within 30 days of the receipt of the Notice of Intent to Assess a Penalty. 29 C.F.R. § 2560.502c-2(e).

Concerning the matter at hand, on July 14, 1993, within 30 days of the its Notice of Intent to Assess a Penalty dated June 24, 1993, the Complainant received four identical statements of reasonable cause from the Respondent wherein the Respondent presented the reasons for its overdue filing of the annual reports for the fiscal years 1988 through 1991. (See JX 4a - 4d) In such statements of reasonable cause, the Respondent detailed a series of events (listed above) which caused it to neglect to timely file its own employees' benefit plan's annual reports over a four year period. The series of events included an expansion of the Respondent's business immediately followed by the unexpected death of its managing partner, an IRS audit of the Respondent and its partners, a lawsuit by the managing partner's estate, and the professional and personal trauma associated with the above occurrences.

In promulgating the regulations underlying ERISA, the Secretary declared that "[t]he Department anticipates that [ERISA section] 502(c)(2) penalties will be waived to the extent that reasonable cause is demonstrated by the plan administrator." See Final Regulation Relating to Civil Penalties Under ERISA Section 502(c)(2), 54 Fed. Reg. 26,892 (1989). Furthermore, the regulations for considering reasonable cause do not define the specific circumstances under which reasonable cause would exist and are sufficiently flexible to ensure that appropriate consideration is given to good faith and diligent efforts by the administrator to comply with the annual reporting requirements. Id. Thus, the amount assessed under ERISA section 502(c)(2) is determined taking into consideration the degree of willfulness of the failure to file the annual report. 29 C.F.R. § 2560.502c-2(b)(1).

The Complainant did not offer any evidence that the reasons presented by the Respondent for its late filings were in any way fabricated or exaggerated. Therefore, I consider the events discussed in the Respondent's Statement of Reasonable Cause of July, 1993 to accurately represent the condition of the Respondent's business up to and including the periods when the Plan's annual reports were not timely filed. Furthermore, no evidence was presented that the Respondent's late filing was intentional nor willful. Rather, the evidence indicates that the Respondent, in attempting to solidify its business after a series of devastating events, simply neglected to file the annual report for its own

employees' profit sharing plan during the 1989-1991 period. Also, no evidence was presented that when the Respondent filed the Form 5500 reports for the missing years in 1992, such filings were inaccurate or deficient in any way.

Therefore, after weighing the totality of the circumstances, I find that the Respondent has shown reasonable cause which compels the waiver of the penalties assessed. To find that the Respondent has not shown reasonable cause for its delayed compliance with ERISA would set the precedent of forcing future plan administrators attempting to show reasonable cause of having to present evidence of a catastrophe of biblical proportions in order to have its penalties waived. I do not believe that Congress intended that such a burden be put on administrators when it drafted the "reasonable cause" provision.

Consequently, I find that the problems suffered by the Respondent, both prior to and during to the periods of non-filing, when taken as a whole, constitute "reasonable cause" as intended under 29 C.F.R. § 2560.502c-2(e). While the proper filing of a plans's annual report is an essential device in achieving the objectives of ERISA, I nevertheless find that the Respondent presented sufficient evidence which justifies the waiver of the civil penalties assessed by the Complainant, in the amount totalling $4,000, for the untimely filing of annual reports for the fiscal years 1988, 1989, 1990 and 1991. Therefore,

ORDER

IT IS ORDERED that assessment of the civil money penalty against the Respondent in the total amount of four thousand dollars ($4,000) is hereby REVERSED.

Furthermore, IT IS ORDERED that, in the event of future noncompliance with ERISA by the Respondent, the above-discussed violations of ERISA by the Respondent, although excused in this instance, shall be considered when determining "the degree of willfulness" of the Respondent's noncompliance. See 29 C.F.R. § 2560.502c-2(b).

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DANIEL J. ROKETENETZ
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Pursuant to 29 C.F.R. § 580.13, any party dissatisfied with this Decision and Order on Remand may appeal it to the Secretary of Labor within 30 days of the date of this Decision, by filing notice of appeal with the Secretary of Labor, United States Department of Labor, Washington, D.C. 20210. A copy of the notice of appeal must be served on all parties to this Decision and Order and on the Chief Administrative Law Judge, United States Department of Labor, 800 K Street, N.W., Suite 400, Washington, D.C. 2001-8002. If no timely appeal is made, this Decision and Order shall be deemed the final agency action.